No. 98-1777

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term 1998

W.C. BAIN, JR., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; CITY OF SPARTANBURG,

Petitioners,

v.

JOSEPH H. NORWOOD, individually and as representative of a class of citizens,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, the class representative of a class of 74 citizens ("class"), submits the following reasons why the Petitioners' ("City") request for certiorari review should be denied.

The class submits that the City's Statement of the Case creates an inaccurate impression of the facts of this case. Judge Philips's factual recitation in the original panel decision more accurately reflects the events of his case. *See App.* at 14-18. Of particular note is the description of the searches provided in that opinion. *App.* at 16 n. 1. The City's version of the facts is simply not consistent with that found by the district court or of the prevailing decision of the court of appeals. The essential fact in this matter is that the City through its chief of police engaged in wholesale suspicionless searches of citizens without prior judicial notice or administrative consultation in a situation in which other law enforcement professionals strongly disagreed about the threat to public safety. *See App.* at 16 (regarding South Carolina Law Enforcement Division's decision not to participate in the entry search procedure or provide extra security due to the "large number of family groups and regular civilians at this function").

REASONS FOR DENYING THE WRIT

The City's arguments do not adequately explain why this case should be accepted for review. There is no split in the circuits on this issue, and other than citing to administrative search cases that involve substantially different principles, the City has cited no opinion of this Court that conflicts with the decision in this case. Petitioners' reliance upon the line of administrative search cases to support their arguments that the suspicionless searches were reasonable ignores the constitutional significance of the requirement of a "documented public record" of harm to support administrative search schemes.

While the reasonableness requirement is ordinarily fulfilled by a warrant or some level of individualized suspicion, the plaintiff class recognizes that these traditional requirements are not "an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Rabb*, 489 U.S. 656, 665 (1989). However, when dispensing with the traditional components, this Court has imposed or identified other objective constraints upon law enforcement to limit unfettered discretion. In the case of courthouse and airport searches, a well-documented history of terrorism and resulting nationwide regulations provide objective limits upon law enforcement's ability to search as well as the scope of the search. Thus, while the City may be correct that a public record of need is unworkable for some law enforcement challenges, other objective limitations such as administrative or statutory schemes, business regulations, or area warrants have been recognized as providing the constraints necessary in almost all cases in which individualized suspicion is not required. It is this requirement of independent constraint that the City ignores in its arguments.

Unquestionably, there are circumstances when the warrant\individualized suspicion requirements are not practical. Judge Wilkins' factual scenario of the vehicle with the bomb is a good example of such a circumstance. If public safety is seriously threatened by the time it would take to get independent judicial approval of a law enforcement procedure that would normally violate a citizen's constitutional rights, our system allows for immediate action. Our constitutional law has consistently recognized that *exigent* circumstances may relieve law enforcement from the warrant or individualized suspicion requirements. This is nothing new. So long as the official acts in good faith, their conduct is protected, even if, in hindsight, it is in error. The use of such analysis in this case is misplaced. There was no time constraint, and the search procedure was planned well in advance.

Except in actual exigent circumstances when time is of the essence, there must be some independent objective control to constrain law enforcement discretion. This is because the purpose of the Fourth Amendment is to protect citizens' privacy from "official arbitrariness," *United States v. Ortiz*, 422 U.S. 891, 895-96 (1975), and the "`unbridled discretion' of government officials." *Turner v. Dammon*, 848 F.2d 440, 446 (4th Cir. 1988). Yet in this case no alterative control has been proposed or suggested. The City's analysis does not factor this basic element into the equation even though all of the cases cited in support of the City's position rely upon this concept to provide the reasonableness component.

The decision in this case goes beyond whether to approve, in hindsight, the searches conducted at the cattle gate. The City's analysis seeks to establish a new exception in the "closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 117 S.Ct. 1295, 1298 (1997). It is suggested that the searches conducted in this case are constitutional because they fall under the category of "special governmental needs, beyond the normal needs of law enforcement." *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989). The class submits that this position expands "special needs" exception beyond its intended meaning and purpose. For example, this Court explained that exceptions to the warrant\individual suspicion requirement exist in areas in which "there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted." *Vernonia School Dist. 47J. v. Acton*, 115 S.Ct. 2386, 2390 (1995). However, application of that concept to this case demonstrates how inappropriate this case is for application of the exception. The potential dangers at public meetings and celebrations are not ones unfamiliar to law enforcement. When the Fourth Amendment was adopted, public functions were common. One may assume that similar weapons (hammers, metal wrenches and guns) were common, such weapons were

sometimes carried to public functions and, on occasion, law enforcement officials learned that trouble might occur at a planned event.

The specific danger sought to be remedied by the City in this case is simply not unfamiliar to law enforcement. To expand the meaning of "special needs" to include situations commonly faced by law enforcement officials contradicts this Court's careful confines in this area of exception. Unquestionably, an effective method of preventing weapons at a public gathering is to search each person's possessions. The same would surely apply to political and "issue" rallies. The potential dangers involved in these events are often substantial. Giving law enforcement the unfettered discretion to engage in mass searching procedures without prior authorization invites the exercise of the authority without the traditional safeguards that have ensured the reasonableness of governmental action. As a result our courts would no longer be considering exceptions based upon statutory authorization, but would be passing in hindsight upon the dangers involved in an infinite variety of factual scenarios.

Except in carefully limited situations as delineated in *Chandler*, we do not engage in wholesale searches because the risks are a part of the price our society has deemed acceptable to protect our individual constitutional liberties.

> It is not enough to argue, as does the Government, that the [public] problem ... is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsel a resolute loyalty to constitutional safeguards.

Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

The standard used by law enforcement to this point in time has been clear. Unless authorized by statute or regulation or in actual exigent circumstances, wholesale searches are not to be conducted. The class of citizens submits that the existing rule well serves society and law enforcement.

Chief Bain seeks review of the district court's denial of qualified immunity. The class submits that this issue is not one of significant importance, and the decision does not conflict with any existing case in this Court or create a split in the circuits.

CONCLUSION

For the foregoing reasons the plaintiff class requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted, this the 12th day of May, 1999.

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